Small Arms and Light Weapons Proliferation and the Maintenance of International Peace and Security

The Security Council to Legislate to Regulate the Arms Trade

University of Oslo

Faculty of Law

Candidate number: 01

Supervisor: Nobuo Hayashi

Deadline for submission: October 01, 2009

Number of words: 17,947 (max. 18.000)

30.09.2009

TABLE OF CONTENTS

Acknowledgement

I offer thanks to the Almighty God for His protection and guidance through out this study. I wish to also express my profound appreciation to my supervisor Nobuo Hayashi of the International Peace Research Institute, Oslo who painstakingly read drafts of this study and provided exceptionally insightful comments. I am very grateful Sir. I am further indebted to Professor Cecelia M. Bailliet and Bente Lindberg Kraabøl for their unflinching support. To the excellent staff at the Faculty of Law of the University of Oslo and the Peace Research Institute, Oslo who enthusiastically assisted me to retrieve critical material, I am deeply grateful.

Dedication

I dedicate this work to the millions of people affected in diverse ways by small arms and light weapons proliferation.

Acronyms

AIDS	Acquired Immune Deficiency Syndrome
AJIL	American Journal of International Law
ASEAN	Association of South-East Asian Nations
ATT	Arms Trade Treaty
BICC	Bonn International Centre for Conversion
ECOWAS	Economic Community of West African States
EU	European Union
GA	General Assembly
HIV	Human Immunodeficiency Virus
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
MJIL	Melbourne Journal of International Law
NJIL	Nordic Journal of International Law
OAU	Organization of African Unity
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
RPF	Rwandese Patriotic Front

SADC	Southern African Development Community
SALW	Small Arms and Light Weapons
SC	Security Council
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNCIO	United Nations Conference on International Organization
UNGA	United Nations General Assembly
UNOMUR	United Nations Observer Mission Ugandan-Rwanda
UNSC	United Nations Security Council
US	Unites States
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treatise
WMD	Weapons of Mass Destruction

CHAPTER ONE

1. General Overview of the Study

At the heart of the formation of the United Nations (UN) in 1945 lies the ultimate goal to promote and maintain international peace and security.[1] With the scourge of the Second World War still freshly in mind and the apparent failure of the League of Nations[2] to prevent it, the framers of the UN Charter were careful not to create another toothless organization. Chapters V, VI, VII, VIII, and XII of the UN Charter established and mandated the UN Security Council (SC) to, *inter alia*, take the primary responsibility in championing the promotion and maintenance of international peace and security. Among other things, the Security Council is to formulate plans for the establishment of a system to regulate armaments; and to determine the existence of a threat to the peace or a breach of it or acts of aggression and to recommend what actions should be taken.

Weapons of Mass Destruction (WMD) have largely remained the main focus of disarmament efforts during the last half of the twentieth century. The risk of nuclear, biological, or chemical weapons proliferation engulfed the attention of the international community, in particular the SC, to the extent that implied that not solely focusing on these weapons at the time, would be a costly mistake. Indeed, the threat of proliferation of these weapons still remains even today. However, the threats posed by the illicit trade in Small Arms and Light Weapons (SALW) equally give cause to worry and deserve the same attention being paid to nuclear, biological, or chemical weapons. To be sure, not since the days of Hiroshima and Nagasaki has there been any recorded history of someone killed through the deliberate use of any of the WMD. Yet, almost all of the conflicts fought in the immediate aftermath of the Cold War and since have largely been fought with these SALW including virtually all of the

[1] Article 1 of the United Nations Charter
[2] Schweigman (2001) p.31

internal wars that have plagued Africa since 1990.[3] While states have established international norms in the areas of nuclear non-proliferation and banned chemical and biological weapons and anti-personnel land-mines, there is no such framework of norms and standards to eliminate the illicit trade in small arms and light weapons.

The scope of arms in this study is limited to small arms and light weapons which constitute a sub-category of conventional weapons that can be carried by one person or a small crew. The UN classifies them as follows: Small arms include revolvers and self-loading pistols, rifles and carbines, assault rifles, submachine guns and light machine guns. Light weapons are said to cover: heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-tank and anti-aircraft guns, portable launchers of anti-tank and anti-aircraft missile systems and mortars of less that 100mm calibre.[4] For the purposes of this study, the terms 'small arms', or 'small arms and light weapons' or the abbreviation 'SALW' will be used interchangeably to denote both classes of weapons.

More than 1300 people are estimated killed each day as a direct consequence of the use of arms and many more are forced to flee from their homes, raped, tortured, or maimed.[5] More than 740,000 people are estimated killed through armed violence each year, both directly and indirectly, with approximately two-thirds of these deaths occurring outside war zones.[6] Illicit arms are also used in terrorist acts, organized crime, and other clandestine activities. Kofi Annan, the former UN Secretary General emphasized the centrality of small arms to the distress and conflict experienced in developing countries during the 1990s. He wrote;

> The death toll from small arms dwarfs that of all other weapon systems-and in most years greatly exceeds the toll of the atomic bombs that devastated

[3] Hazdra (2007) p.15
[4] UNGA Res. A/52/298, 27 August 1997
[5] Small Arms Survey (2001) p.1
[6] UNGA Doc. A/C.1/63/L.39, 17 October 2008

> Hiroshima and Nagasaki. In terms of the carnage they cause, small arms, indeed, could well be described as "weapons of mass destruction".[7]

This study seeks to analyze what role the Security Council ought to play with regards to the illicit global arms trade and its adverse effects on the peace since the Council has the 'primary responsibility' in the maintenance of international peace and security. In the report of the General Secretary on small arms to the Security Council on September 20, 2002, he underscores that preventing, combating and eliminating the uncontrolled spread in small arms and light weapons constitutes one of the key tasks of the Security Council in discharging its primary responsibility for the maintenance of international peace and security.[8] In the same report, the General Secretary acknowledged that the spread of illicit small arms and light weapons is a global threat to human security and human rights. The point of reference in this study is the precedence set by the Security Council on countering the threats of terrorism and weapons of mass destruction in its resolutions 1373 (2001) and 1540 (2004) respectively.[9]

1.1 Research Questions

There are considerable legal, moral and political questions concerning the role of the UN Security Council in dealing with the threats pose by the illicit global trade in SALW. However, this study attempts to answer two lingering questions:

1. Does the illicit global trade in small and light weapons qualify as a threat to international peace and security under Article 39 of the UN Charter and the subsequent practices of the Security Council?

[7] UNGA Res. A/54/2000, 3 April 2000
[8] UNSC Res. S/1053/2002, 20 September 2002
[9] UNSC Res. S/Res/1373/2001, 28 September 2001 and UNSC Res. S/1540/2004, 28 April 2004

2. Should the illicit trade in arms be determined as a threat to peace and security, what enforcement measure(s) would be available to the Security Council?

1.2 Objectives of the Study

The objectives of this study are to undertake a concerted analysis of the mandate and practices of the SC to point to its jurisdiction over the current illicit global trade in small and light weapons and to seek its immediate action. Firstly, an analysis will be done on whether or not the illicit global trade in small and light weapons qualifies as a threat to international peace and security under Article 39 of the UN Charter and the practices of the SC. Secondly, in the past the Council has used its 'legislative power' to adopt two far-reaching resolutions (binding on all UN Member States) on countering the threats of terrorism and WMD.[10] Further analysis would be carried out on the possibility for the Council to legislate again, this time, to counter the threat posed by the illicit arms trade to international peace and security.

1.3 Methodology and Sources

This study will combine both historical and legal approaches. The historical approach will be most appropriate for detailing the overview of the illicit global trade in arms. This approach will further be used to provide insights into the various issues which have been subsumed under the authority of the SC in the past. The legal approach will be appropriately used to facilitate the interpretation of the legal articles spelling the powers and functions, as well as the legalities of the UN Security Council's practices. Legal sources such as relevant articles of the UN Charter and other legal resources, textbooks, specialists and general journals will be reviewed. Also, relevant NGO reports and appropriate websites will be resorted to. In this regard, recourse will be made to the text of relevant provisions of the Vienna Convention on the Law of Treaties (VCLT), 1969 in the interpretation of the various legal materials.

[10] Ibid

1.4 Delimitation and Structure of the Study

This study has very limited specific objectives and focus, and it is structured in a way that keeps the study focused on addressing the two underlining questions.

1.4.1 Delimitation

This study will limit itself to the discussion on the interpretation by the Security Council of Articles 39, 40 and 41 of the UN Charter and its practices thereon as the scope of this study will not permit further extended discussion of all of its powers. This limitation is purposefully sustained to enable the discussion to be directed towards pointing to the legality and cogency in subsuming the illicit trade in arms under the authority of the SC as far as it affects international peace and security. The study will be further curtailed to the analysis of specific resources that underscore the harmful effects of the illicit trade in arms on the promotion and maintenance of international peace and security. The discussion on the role of the SC would be limited to the precedence set in resolutions 1373 and 1540 and the power of the Council to regard the threat posed by the illicit trade in arms as a threat to the peace and to take similar action

1.4.2 Structure

This study is organized around six chapters. *Chapter one* provides a general overview of the study: the introduction to the study; the research questions of the study; the objectives of the study; and the delimitation and structure of the study. *Chapter two* will mainly deal with the existing global arms trade: the global arms trade; legal and illicit trade in arms; and the human cost of the illicit trade in arms. *Chapter three* discusses the efforts to combat the illicit trade in arms: global, regional and national initiatives. *Chapter four* discusses the Security Council and maintenance of peace and security; functions, powers and practices of the Security Council under the UN Charter. *Chapter five* comprises the discussion and analysis of the two research questions underlining this study whereas *chapter six* provides the summary and conclusion of the study.

CHAPTER TWO

2. The Global Arms Trade and Its Human Cost

The trade in SALW is neither a new profession nor is its human cost. However, it is only in the early 1990s that the de-stabilizing effect of the illicit transfer, accumulation and misuse of small arms and light weapons prompted a sustained international scrutiny on the arms trade. For centuries states have solely regulated the production, trade and transfer of these weapons within their own territories. But, the widespread nature of the violence wrought by SALW across the globe since the 90s is indicative of the global nature of the threats pose by the illicit arms trade and how states have failed to successfully regulate the trade in and transfer of SALW.

2.1. The Global Trade in Arms

The global arms trade is the main channel for the supply of weapons and munitions to governments for legitimate use including self-defense, peace-keeping and law enforcement. Yet, while many of the weapons and munitions used to commit violations will have been produced locally, the arms trade also supply guns, ammunitions, grenades, mortars and other weapons into the hands of irresponsible governments and other non-state actors, providing them the lifeline for warfare, repression, terrorism or violent crime. The illicit trade in SALW further provides the avenue through which cheap weapons are supplied to commit gross violation of international law, including human rights and humanitarian law.

The global trade in SALW is a booming business. The small arms survey 2009, based on the UN Commodity Trade Statistics Database, suggests that the previous estimate of USD 4 billion for the global authorized trade in SALW and their parts, accessories, and ammunitions in its 2006 edition, is a significant underestimate.[11] It is still extremely difficulty to exact a firm value on the global authorized arms trade because it is largely un-documented despite

[11] Small Arms Survey (2009) page 7

greater reporting on firearms transfers. The information that is gathered from the few countries who dare report is at best spotty and imperfect. A number of others remain selective in the provision of information, issue misleading data, or do not report on their small arms transfers at all.[12]

2.1.1 The Various Shades of the Global Arms Trade

On a continuum, the arms trade is undertaken in three markets: the legal, the illegal and the grey markets. The legal trade in arms involves the authorized trade that supply arms and munitions to governments, registered and recognized private security firms as well as the UN for the purposes of self-defense, peace-keeping and law enforcement. The small arms survey 2006 pegs the lucrative legal trade in the three main categories of firearm- sporting and hunting shotguns and rifles, pistols and revolvers, and military firearms – at a totaled approximately USD 1.44 billion in 2006.[13] The transfer is deemed legal, if it involves transfers that are authorized by at least one government.[14] The legal market is also commonly held to mean that the transfer process is responsibly carried out to avoid diversion into the illicit spheres. However, it is common knowledge that most of the weapons in the illicit spheres are diversions from legitimate sources. As with the trafficking of any commodity, money has become the driving force behind the SALW trade

The illegal trade, on the other hand, takes place in an entirely illegitimate setting. What is characteristic about the illegal trade is that, the transfers are synonymous with 'black market' transfers and both terms refer to transfers that are not authorized by any government. The nature of the arms smuggle, largely shrouded in secrecy, makes it even more difficult to know the global or even regional magnitude of the illegal arms transfers in terms of the overall dollar value or quantities of weapons. These illegal transfers usually involve private dealers and brokers who often have ties with various governments' intelligence agencies and

[12] Ibid, pages 8-9
[13] Small Arms Survey (2006) pages 7-8
[14] Small Arms Survey (2007) page 74

they knowingly violate the arms sales laws or policies of source, transit and/or recipient states for commercial gains.[15] Also arms sales to governments or insurgents who have been placed under UN or applicable regional embargoes fall within the illegal trade. In a report by the UN panel studying light weapons trafficking, the panel noted that "networks operating internationally and other modes of transfer used for the illicit transfer of a variety of commodities are also used to transfer weapons. The techniques used involve smuggling, concealment, mislabeling and false documentation. To hide financial transactions, use is made of coded bank accounts protected by the secrecy laws of some financial institutions. To transport weapons, various methods are used, such as ships with bogus registration and flags of convenience".[16]

The grey market sales are even more difficult to classify because of its overlapping nature between the legal and illegal markets. But the grey market transfers, which is also referred to as 'irresponsible transfers' are generally transfers that are authorized by a government, but are nevertheless doubtful legally, at least with reference to international law, or irresponsible in the sense of significant risk of diversion to unauthorized recipients.[17] The main definitive characteristic of this trade is that almost all the weapons that end up here are those that are authorized but get diverted through dubious transfer procedures. Thus the weapons may begin as legally produced and purchased items but through several mediums, they are diverted into the illegal market. Often some of these mediums include purposeful lack of registration of legally authorized transfers, not properly tracking the transfer process, diversions, theft and capture of state security forces' arms. The grey market is facilitated by arms brokers who are the ubiquitous and crucial players in the SALW trade.[18] They are responsible for the transfers of several numbers of weapons for use by some irresponsible governments and insurgents.

[15] Lumpe (2000) p.27
[16] UNGA Res. A/52/298, 27 August 1997
[17] Small Arms Survey (2007) p.74
[18] Singh and Widome (2002) p.160

The term illicit transfers or illicit trade in arms is generally used to describe both the irresponsible and illegal transfers – the grey and black markets. It is regarded as those that occur outside the control, or against the wishes, of exporting states.[19] A 1996 UN report[20] provides a useful definition of the illicit trade in arms as being "that international trade in conventional arms, which is contrary to the laws of States and/or international law." It thus implies that an illicit arms transfer would necessarily breach international law; the laws of exporting, transit, and/or importing states; or a combination of these laws.[21] The weapons here are either unauthorized purchases or irresponsibly transferred or both. Estimates of the size of the illicit trade have ranged from 10-20 percent to 55 percent of the legal trade.[22] The former UN Secretary General, Kofi Annan, in an address in 2006 estimated the illicit trade in small arms to be worth USD 1billion annually.[23] Indeed, economic interests and weak state apparatus continue to underpin some of the main reasons for both the supply of arms to the illicit market and the demand for arms on the illicit market.

2.2. The Human Cost of Arms Trafficking

Small arms and light weapons continue to pose an ever increasing problem in almost every human endeavor. In conflict and post-conflict areas, the problem becomes even more daunting and monumental. Although there is no robust evidence that implicates SALW as a primary source of conflicts, they have very negative consequences on a society: they contribute to civil wars, crime, insecurity, even terrorism and they severely impede development, thus creating a vicious cycle of violence and underdevelopment. There are an estimated 600 million SALW in circulation worldwide. More than 50% of those weapons are not held by governments, but non-state actors and they are responsible for 85-90% of persons killed or injured globally.[24] They are instrumental in the deaths of reportedly more than

[19] Lumpe (2000) p.27
[20] UNGA Res. A/51/42, 10 December 1996
[21] Ibid.
[22] Dyer and O'Callaghan (1998) p.3
[23] UN Doc. SG/SM/10537, DC/3031, 26 June 2006
[24] Hazdra (2007) p.8

740,000 people annually – of which 300,000 people are killed by SALW in armed conflicts every year.[25] Analysts estimate the vast majority of these victims – up to 90% - to be civilians.

The global proliferation of SALW increases both the lethality of violent encounters and the number of victims. Guns increasingly transform minor disputes into shootings and make it easier for children to become killers. The then Secretary General of the UN, Boutros Boutros-Ghali, while presenting his state of the world address on the occasion of the fiftieth anniversary of the UN in 1995, became the first major world figure to sound the alarm about a new global threat: the spread and misuse of SALW.[26] Almost two years later, the Canadian Foreign Minister, Axworthy, in a speech to the UN General Assembly on 25 September 1997, reiterated the effects of small arms among civilians:

> Land mines are not the only complex, cross-cutting problems to be addressed if we are to reduce or prevent conflicts. All too often it is small arms, rather than the weapons systems targeted by disarmament efforts, that cause the greatest bloodshed today. In the hands of terrorists, criminals and the irregular militia and armed bands typical of internal conflicts, these are the true weapons of mass terror.[27]

No region, no country and nobody is immune from the devastating consequences of the illicit trade in small arms and light weapons. The SALW trade is one of those rare issues whose effects are not confined to a specific segment of society, nor to a specific country or region, or to a specific socio-economic or ethnic group. The trade has enabled and wrought terror and carnage across the globe. Perhaps no area of the world has been more drastically affected by the small arms trade than Africa.[28] While the accumulation of these weapons by themselves did not cause the conflicts in Africa, it is estimated that almost 90% of the

[25] Ibid.
[26] Laurence (2002) p.193
[27] UN Press Release GA/9453, 25 September 1997
[28] Singh and Widome (2002) p.160

conflicts fought in Africa since the 90s escalated to disturbing proportions due to easily available SALW in the region mostly through the illicit market.[29]

Counting the human cost of the illicit trade in arms is endless. The Program of Action adopted during the 'UN Conference on Illicit Trade in Small Arms and Light Weapons in All its Aspect' neatly sums up some of the possible negative consequences associated with the proliferation of SALW. These include: increasing the intensity of contemporary conflicts; diminishing the security of vulnerable groups such as women and children or refugee and internally displaced persons; increasing the violence associated with large-scale criminal activity (and the concomitant burden of the criminal justice system); eroding development gains and the prospects for socio-economic development; threatening humanitarian relief operations and workers; and increasing the public health burden associated with firearms violence.[30] For decades these negative consequences of arms trafficking have been with us, increasingly diminishing the prospects of living in a secured and peaceful world. There is, however, yet to be a more globally coordinated comprehensive effort to forestall the debilitating effect of arms trafficking on humanity.

[29] Hazdra (2007) p.31
[30] Small Arms Survey (2002) p.228

CHAPTER THREE

3. Combating the Illicit Trade in Arms

For decades the dangers pose to peace, security and development efforts through arms trafficking have being with us but the political will needed to tackle this issue has been slow at coming. Initially, the issue was regarded as a solely domestic issue while major conventional weapons have been addressed as central issues in international relation.[31] However, during the mid-1990s, policymakers around the world started to target each of the links in the chain with dozens of unilateral, bilateral, regional and global initiatives – albeit with varying degrees of seriousness.[32] In general, the weaknesses in these initiatives underscore the fact that combating arms trafficking will require both legal and political approaches as well as practical disarmament measures in the field.[33] This chapter thus provides an overview of the efforts to combat the illicit trade in SALW.

3.1 National Initiatives

For several decades, states have been in charge of regulating their arms trade through laws governing the import, export, and transit of military goods. However, considering the current threats pose to national security and developmental initiatives, many national governments have recently embarked on specific efforts to reduce arms trafficking. In general, these efforts include reviewing existing or implementing new legislation to control the ownership and use of firearms by individuals; improving legislation on export controls; prioritizing tracing weapons seized from criminals; cracking down on suspect gun dealers; drafting legislation to control arms brokering; and destroying stocks of weapons surplus to national needs.[34]

[31] Dyer and O'Callaghan (1998) p.3
[32] Meek (2000) p.183
[33] UNGA Res. A/50/60, 25 January 1995
[34] Meek (2000) p.187

However, some states have not demonstrated any commitments to respond to the arms trafficking problem from and within their national jurisdiction. Some have argued that this lack in response may either be that a government is reluctant to address the issue due to ignorance or a lack of political will to take action; or the government is simply unable to respond and control the movement of goods across its borders.[35] Indeed, most of the countries that fall under the latter option are from the developing world and may genuinely lack the necessary capacity to undertake efficient and effective controls. Unlike drug trafficking, which is usually from the developing world to the developed world, arms trafficking are mostly from the developed to the less developed. Increasingly, therefore, states begun to realized that regional approaches are necessary to address factors present in illicit arms trafficking that cannot be controlled nationally.

3.2 Regional Initiatives

Indeed, the trafficking in arms has become an enormous challenge for states not the least because it has proven to be complex and no respecter of border. The increasing inability of individual countries to stem the effects of the trade has prompted coordinated regional efforts in diverse areas of Africa, Europe, the Americas, Asia and the Middle East. These regional efforts are tailored toward combating arms trafficking in general as well as prioritizing the issue within the context of regional crime.

3.2.1 The Americas

It is posited that the illicit traffic in firearms first appeared on the radar of the Organization of American States (OAS) in 1990, in the context of its relationship to drug trafficking.[36] Momentum around a Mexican-led initiative for a hemispheric-wide convention on illicit weapons trafficking resulted in the negotiation in 1997 of the Inter-American Convention

[35] Ibid.
[36] Ibid, p. 189

against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Material.[37] The convention came into force in 1998 with the aim "to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related material" as well as "promote and facilitate cooperation among States Parties […]"[38] The 30-article convention sets out a broad set of commitments, control mechanisms, legal requirements, and cooperation procedures.[39] In addition, the Model Regulations,[40] negotiated separately from the convention within the OAS, are an important part of efforts to tame the scourge of firearms trafficking in the Americas. However, despite the massive commitment to the principles of the convention by most countries in the region, their ability – financially and politically – to enact necessary measures to comply with the agreement remains less clear.[41]

3.2.2 Africa

Following the 35th Summit of the Organization of African Unity (OAU) held in Algiers in July 1999, the OAU convened the First Continental Meeting of African Experts on Small Arms and Light Weapons in Addis Ababa, Ethiopia in May 2000. The meeting decided on the adoption of an African common position and agreed a set of recommendations for the adoption of policies, institutional arrangements, operational measures for addressing the proliferation, circulation, and trafficking of small arms.[42] The ensuing Bamako Declaration, issued in Mali during the OAU Ministerial Meeting held in December 2000, explicitly stated the wide-ranging and devastating impact that the uncontrolled proliferation of small arms and light weapons is having on the African continent.[43] It therefore aims to ensure a coordinated

[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid, p.191
[41] Ibid.
[42] Coe and Smith (2003) p.47
[43] Ibid.

action to control small arms proliferation across Africa at the national, regional, and international levels.

It is also an important guide and reference point for the implementation of the other key African Agreements that have been concluded at the sub-regional level, including the Southern African Development Cooperation (SADC) Protocol on the Control of Firearms, Ammunitions and Other Related Materials; the Economic Community of West African States (ECOWAS) Moratorium on the Importation, Exportation and Manufacture of Light Weapons; and the Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa. Thus, whereas there may not exist a fully-fledged regional treaty or convention in Africa, these sub-regional initiatives represent a mix of legally and politically binding efforts within Africa to tackle the scourge of small arms and light weapons. Indeed, many of the commitments in the Bamako Declaration are similar to those contained in the sub-regional agreements even though, in some cases these sub-regional agreements have built upon and go beyond the commitments in the Bamako Declaration. Implementation of the Bamako Declaration has begun but at a slow pace.[44]

3.2.3 Europe

The recognition of the problems associated with small arms and light weapons trafficking within the European Union (EU) started in the late 1990s. Barely a year after the EU adopted the "Program for Preventing and Combating Illicit Trafficking in Conventional Arms" on 26 June 1997,[45] the 15 EU member states agreed the Code of Conduct on Arms Exports in 1998, which requires members to take into consideration issues such as human rights and regional stability when authorizing arms transfers.[46] This program commits EU members to strengthen national efforts to prevent and combat arms trafficking, provide assistance to other

[44] Ibid, p.49
[45] Meek (2000) p.197
[46] Ibid

countries affected by arms trafficking and ensure cooperation among national authorities. In December 1998 the EU further adopted a Joint Action on Small Arms, which, among other things, commits EU members to providing financial assistance to countries combating illicit arms trafficking, as well as barring exports to non-state actors in other states without permission of the receiving government officials.[47] The EU and the Organization for Security and Cooperation in Europe (OSCE) have since adopted a number of other agreements and guidelines, including the 23 June 2003 European Union Common Council Position on Arms Brokering; and the OSCE Document on Small Arms and Light Weapons of November 2000, all in the effort to stamp out the debilitating effects of the illicit trade in arms both within Europe and beyond.[48]

3.2.2.4 Other Regions

As a sign of recognition of the global nature of the threats pose by the illicit trade in small arms and light weapons, Asia-Pacific and the Middle East and North Africa have become the latest regions taking collective efforts against arms trafficking within their respective regions. It is not to say that the effects of arms trafficking are new in those regions but that the response and the political will have been slow in coming. For instance, the Association of Southeast Asian Nations (ASEAN) first raised the issue of small arms and light weapons at the 1997 Ministerial meeting held in Malaysia where the smuggling of small arms was recognized as integral part of terrorism, drug trafficking, money laundering, trafficking of persons, and piracy.[49] This was followed by the adoption of the ASEAN Plan of Action to Combat Transnational Crimes in 1999.[50] But it was not until the Jakarta Regional Seminar on Illicit Trafficking in Small Arms and Light Weapons in May 2000, did the ASEAN addressed the small arms issue as a distinct topic.[51] A number of seminars and frameworks

[47] Ibid.
[48] Selected UN Documents (2008) pp.86-87
[49] Kramer (2001)
[50] Ibid.
[51] Ibid.

have followed this seminar in the attempt at dealing with the arms trafficking problem in the region.[52]

Like the ASEAN case, the reaction within the Middle East and Northern Africa region was equally recent. The first regional workshop on small arms in the Arab World was held in Amman, Jordan on 6-7 May 2001.[53] At the workshop, there was broad recognition that coordination and cooperation among Arab states were crucial components of effective action on small arms, chiefly among the areas of concern was the illicit trade in small arms.[54] Measures proposed by participants designed to tackle this problem included enhanced border controls, cooperation between law enforcement agencies, and common measures aimed at combating illicit arms brokering.[55] Subsequently, the Ministerial Council of the League of Arab States adopted resolution 6447 of 14 September 2004 on Arab Coordination for Combating the Illicit Trade in Small Arms and Light Weapons.[56]

3.3 International Initiatives

The destabilizing effects of illicit trade in SALW was first raised in 1995 by the then UN General Secretary, Boutros Boutros-Ghali, in his 1995 Supplement to 'An Agenda for Peace' in a UN forum in a General Assembly resolution.[57] In the said resolution, he challenged the international community to 'find effective solutions' to the problem of small arms proliferation and misuse illustrated by the conflicts the UN was grappling with at that time. In December 1995, the General assembly authorized the first small arms Panel of Experts to prepare a report on the types of weapons being used and the nature and causes of their accumulation and transfer, and to make recommendations for appropriate action.[58] The

[52] Meek (2000) p.183
[53] Tealakh, Gali Oda, et al. (2002) p.6
[54] Ibid.
[55] Ibid.
[56] Meek (2000) p.183
[57] UNGA Res. A/50/60/-S/1995/1, 25 January 1995
[58] UNGA Res. A/50/60-S/1995, 25 January 1995

August 1997 report of the Panel recommended, *inter alia*, that the UN consider convening a global conference on the small arms issue.[59] A second Group of Experts on small arms produced a report in August 1999 which set out objectives for an International Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.[60]

The United Nations Conference, which was eventually held from 9-20 July 2001 at the UN Headquarters in New York, adopted a "Program of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, in All its Aspects."[61] This Program of Action includes a number of measures to be taken at the national, regional, and global levels, such as marking, registration, and destruction of weapons that were confiscated, seized, or collected, as well as international cooperation and assistance to strengthen the ability of states in identifying and tracing illicit arms and light weapons.[62] Critics however found the Conference did not meet expectations: it did not produce a legally binding instrument nor did it make a case for such an instrument with sufficient vigor; and it fails to address some important points, namely, transfers to non-state actors, restrictions on civilian possession, and establishment of export criteria.[63]

To date, there are three specific international instruments concerning the small arms and light weapons issue. In May 2001, states agreed to common measures to combat illicit small arms - 'Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime', (the 2001 UN Firearms Protocol).[64] This Firearms Protocol offers a regulatory framework to the challenges posed by proliferation of illicit firearms and ammunition, and it requires states, *inter alia*, to criminalize offences such as the illicit manufacture and trafficking of firearms and ammunition and the falsification or obliteration

[59] UNGA Res. A/52/298, 27 August 1997
[60] UNGA Res. A/54/258, 19 August 1999
[61] UN Conference in New York, A/CONF.192/15, 20 July 2001
[62] Ibid.
[63] Dhanapala (2002) p.167
[64] Selected UN Documents (2008) p.26

of markings on firearms.[65] The second international instrument is the July 2001 UN Program of Action to combat illicit small arms and light weapons.[66] This instrument laid the foundation for action at the national, regional and global levels and has become a valuable tool for States, international organizations and civil society. As a direct recommendation from the Program of Action to combat illicit small arms and light weapons, states further adopted the 'International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons' (International Tracing Instrument) in December 2005.[67] This instrument also includes provisions on marking new production and Government stocks, marking at the time of import, as well as provides a framework for states to file, where relevant, small arms tracing requests with one another.[68]

Besides these three international instruments concerning the small arms issue, the Security Council has further used arms embargoes as a tool to address the illicit trade and brokering in small arms and light weapons as well as the destabilizing effect of their circulation. There are nine standard United Nations arms embargoes in force currently, which include prohibitions against, *inter alia*, the supply of small arms and light weapons to targeted states, entities and individuals.[69] At the same time, Security Council arms embargoes have proven problematic as states and private actors have violated them with impunity. Although useful as a mechanism for limiting the influx of weapons into an area of conflict, arms embargoes are of limited use in preventing the build up of arms.[70] In short, the current control regimes are patchworks and do not work.

In response to calls for greater global controls on the arms trade UN General Assembly passed a landmark resolution that established the UN process on an Arms Trade Treaty

[65] Ibid, page 45
[66] Ibid.
[67] Ibid, page 47
[68] Ibid.
[69] Ibid, page 48
[70] Emanuela-Chiara (2000) p.34

(ATT) in December 2006.[71] The proposed treaty would be legally binding for all states and cover all conventional arms, including small arms and light weapons, their parts and components and ammunitions. The UN Group of Governmental Experts, established under the December 2006 resolution, submitted its report to the UN Secretary General in August 2008.[72] In its report, the group took note of the existing international instruments on the arms trade as well as of trends in this trade, including the increasing production of arms and their components in joint ventures and licensed production arrangements. The group also observed that poor controls on the arms trade could contribute to violations of UN arms embargoes and the availability of illicit arms for use in terrorist acts and organized crime.[73] In its discussion of the feasibility of an ATT, the group considered that any such treaty "would need clear definitions and be fair, objective, balanced, non-political, non-discriminatory and universal within the framework of the UN."[74]

The UN General Assembly in October 2008 mandates further steps towards an ATT by an Open-Ended Working Group.[75] The group, expected to submit an initial report to the General Assembly at its 64th session in 2009, is tasked to "further consider those elements in the report of the Group of Governmental Experts where consensus could be developed for their inclusion in an eventual legally binding treaty on the import, export and transfer of conventional arms."[76] The working group does not, therefore, have a mandate to negotiate an international instrument on the arms trade. Thus, there is still no firm commitment at the UNGA to start negotiations of an ATT. The consensus-bound procedures of negotiations at the UN will allow individual states, should they so decide, to bloc further developments towards an ATT within the UN framework. There remain significant challenges, therefore, to realizing an arms trade treaty within the General Assembly framework.

[71] UNGA Res. A/RES/61/89, 18 December 2006
[72] UNGA Res. A/63/334, 26 August 2008
[73] Ibid.
[74] Ibid.
[75] UNGA Doc. A/C.1/63/L.93, 17 October 2008. Paragraph 5
[76] Ibid.

CHAPTER FOUR

4. The Security Council and the Maintenance of Peace and Security

The end of the Cold War has certainly seen an unprecedented epic of activism on the part of the UN Security Council. In both the interpretation of its authority and usage in its practices, it has exhibited and made profound decisions, sometimes on touchy subjects, in the effort to keep up with its primary responsibility to maintain international peace and security. The increased activity of the SC, especially in relation to the tendency on its part to interpret extensively the idea of a "threat to the peace" in Article 39 of the UN Charter has triggered intense debate on the limits of its powers and the legitimacy of its practice. On the one hand, many countries and observers mostly from the Third World feel potentially threatening, the extent to which the Security Council has determined many situations as a threat to peace.[77] On the other hand, there are those countries and observers who support the usage of the Security Council's almost limitless powers as an indication that 'the Council had finally started working as had been originally planned.'[78] But which ever side of the debate one belongs to, it remains true that the resolutions adopted by the Security Council since the 90s invoking Chapter VII are unprecedented both in number and in the scope of their content.

In this chapter, I will seek to analyze how the Security Council has understood and used its powers under the UN Charter, but more specifically under Chapter VII. I intend, through this analysis, to demonstrate how extensive the Council's powers are in determining what constitute a threat to the peace. Particular attention will also focus on the Council's 'legislative power' to underscore the extent to which it may go in taking enforcement measures. The case studies will further be used to point to the wide range of issues that may pose a threat to the peace and the possible measures the Council may employ to give effect to its decisions.

[77] Österdahl (1998), p.9
[78] Koskenniemi (1996) p.460

4.1 The Interpretation of Treaties

The interpretation of treaties remains one of the hotly debated issues in international law, often due to its complex nature and the many issues involved.[79] The need for interpretation is evermore necessary since there is a great deal of difficulty on how treaty provisions or other legal texts, including the interpretation of the law of international organizations and their organs may be interpreted. One of the organs often dogged with much controversy over its powers and resolutions is the Security Council. In many ways, this may be due to the indeterminacy of language.[80] Often in many legal documents, almost every term may be interpreted in various ways. Other times, a legal text may also be unclear, incomplete or contradictory because political differences between the negotiating parties necessitated a compromise formulation or simply because the ambiguity was overlooked by the drafters.[81] It is also argued that in addition to the inherent ambiguity of the language, some – often unforeseen - changes in the social, political or technological operating sphere of a treaty may add to the unclear, incomplete or contradictory nature of a legal text.[82]

However, one vital object in international public law is the interpretation of legal texts in a consistent manner so as to establish a less ambiguous or contradictory meaning.[83] There are different schools of thought on treaty interpretation but for the purpose of doing a systematic interpretation of the powers and the practices of the Security Council, I will briefly discuss the theoretical approaches, the Vienna Convention on the Law of Treaties (VCLT) and the United Nations Charter. I will end this section with the approach towards interpretation adopted in this study.

[79] Shaw (1997) p.655
[80] Bix (1993)
[81] Schweigman (2001) p.8
[82] Ibid, p.9
[83] Rosenne (1989), p.224

4.1.1 Theoretical Approaches to Interpretation

The main theories relating to treaty interpretation are represented by the teleological, the subjective, and the textual schools. The former school places emphasis on the importance of the object and the purpose of a treaty.[84] Thus, the most appropriate interpretation of a provision is one that best serves the object and purpose of the treaty. In the view of this doctrine, the general aim of the treaty prevails over the intentions held at the time of the conclusion of the treaty.[85] This is understood in terms of the need for the effective functioning of an organization rather than the sovereignty of its members.[86] Two main principles underline this view. The first is the principle of 'maximum effectiveness', expressed in the rule *ut res magis valeat quam pereat,* which imply that it is better for a thing to have effect than to be made void.[87] In other words, the principle assumes every provision to be included for a reason, and that it should not be rendered redundant. The second principle is that a provision should be interpreted in accordance with the aim of the instrument as a whole.[88] The teleological approach is commonly associated with multilateral conventions of a general nature, such as the UN Charter.[89]

The subjective school on the other hand, postulates that an interpreter must first and foremost try to ascertain the intentions of the parties to a treaty.[90] A prominent proponent of this view, Lauterpacht, argues that 'the intention of the parties – express or implied – is the law. Any considerations – of effectiveness or otherwise – which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation.'[91] This school thus adopts the classical view on interpretation, according to which 'the intentions of the parties is the law'. According to this doctrine, therefore,

[84] Schweigman (2001) p.10
[85] Ibid
[86] Malanczuk (1997) p.336
[87] Schweigman (2001) p.10
[88] Ibid.
[89] Ibid, page 11
[90] Ibid.
[91] Ibid.

establishing the correct meaning of a provision in a text is mainly enhanced when one takes into consideration what the parties intended to achieve in drafting the treaty, the historical background and the circumstances in which the treaty was signed. Some of the critiques of this doctrine are the questions of 'where to find this evidence of these intentions' and 'what effects do unforeseen changes in social, political, economical or technological bring to the operating spheres of the treaty'? To the former, recourse to *travaux préparatoires* is a major aid in the interpretation process but on the latter, this doctrine offers little explanation.

The final school of thought, the textual or literal meaning, presumes that the intention of the parties is adequately expressed in the text of a treaty.[92] Accordingly, the fundamental means to determining the content of a provision is thus an analysis of its text, in conformity with the ordinary meaning of the words used. Some proponents have argued that 'when a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurdity, there is no ground for refusing to accept the meaning which the deed naturally presents.'[93] Ironically, the mere possibility of the meaning of almost every text in a legal provision to be interpreted differently remains the main weakness of this doctrine.

4.1.2 The Vienna Convention on the Law of Treaties

The Vienna Convention on the law of Treaties (VCLT) is a very important instrument defined as 'a compound of codification and of progressive development of customary international law.'[94] The convention's customary international law status is further upheld by the International Court of Justice, which ruled on more than one occasion that the rules on interpretation contained in the Convention amounts to customary international law.[95] According to its Article 5, the VCLT applies to any treaty that constitutes the founding

[92] Ibid.
[93] Ibid, p.12
[94] Dixon (1996) p.54
[95] See e.g. the Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict; Iran v. US; and Guinea-Bissau v. Senegal

charter of an international organization. However, even though the Convention applies strictly to only charters concluded subsequently to its entry into force in 1980,[96] Articles 31 to 33 of the Convention are to be applied by analogy to the interpretation of the Charter by the respective UN organs (especially the ICJ), by the specialized agencies, and by domestic courts and authorities.[97] These three articles may be applied retroactively to the Charter because the customary rules contained in them are deemed to be operative in 1945.

In the first paragraph of Article 31 it is stated that, as a 'general rule of interpretation', a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Interpretation according to the 'principles of good faith' is a *bona fides* rule which is not a specific rule of interpretation, but a general principle of law, the meaning of which is not undisputed and which substance called for a non-arbitrary interpretation of treaties and forbids deviation from its 'true' substantive meaning.[98] Interpretation 'in accordance with the ordinary meaning to be given to the terms of the treaty' on the other hand, can only be determined by looking at the context in which it is used.[99] In other words, a special meaning may only be given to a term if it is established that the parties intended to do so at the time of the founding.

In addition to the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose, paragraphs 2 of Article 31 provide further recourse to be made in relation to other articles, the preamble to the treaty and its annexes, agreements between parties made in connection with the conclusion of the treaty, and the instrument as a whole. Furthermore, paragraph 2 regards agreements made with regard to the interpretation of the treaty or application of its provisions and subsequent practice of the parties establishing agreement regarding the interpretation, as primary sources for determining the 'correct'

[96] See VCLT Article 4
[97] Ress (2002) p.18
[98] Ibid, p.19
[99] Ibid, p. 20

meaning of a term. Moreover, Article 32 of the Convention stipulates that recourse may be had to the "supplementary means of interpretation" in order to provide for additional evidence for an interpretation based on Article 31, or when such an interpretation leads to an ambiguous or unreasonable result. The Convention therefore provides for a mixture of all methods of interpretation.

4.1.3 The United Nations Charter

The United Nations is a unique organization different from all other international organizations due to the so-called objective international (legal) personality attributed to it by the ICJ, i.e. 'a large measure of international personality and the capacity to operate upon an international plane'.[100] The UN Charter therefore has certain features distinguishing it from an 'ordinary' treaty. The Charter has, *inter alia*, been characterized as a constitution for the world community, containing elements of both a *traite-contrat* and a *traite-lio*.[101] The Charter is regarded as a constitution because it is the supreme law that establishes the UN, provides for the functions and powers of the organization as well as its organs. Due to its character as a constitution, rarely has the Charter been amended in almost its entire existence.

With regards to the interpretation of the Charter, various schools of thoughts remain in contention. One school argues that considering that the circumstances surrounding the adoption of the Charter have changed significantly the Charter should be interpreted in a dynamic and teleological manner.[102] The basis in arguing this way may be seen in the obvious change in the membership of the organization. Growth in statehood has seen a corresponding increase in the membership of the UN.[103] Therefore, this school regards, as a matter of principle and equity, the intention of the present members as prevailing over the

[100] Reparations for Injuries, ICJ Reports (1949)
[101] Rosenne (1989) pp.182-184
[102] Shaw (1995) p.778
[103] UN Press Release ORG/1469, 3 July 2006

intention of the original members, which at this time form a minority.[104] Consequently the principle of contemporaneity, according to which "a treaty is to be interpreted in the light of the general rules of international law in force at the time of its conclusion",[105] has been significantly regarded as a principle accompanying the interpretation of the Charter.

Contrary to the former school of thought is the proposition that upholds the intentions of the original parties as an integral part of the interpretation of the Charter: subsequent practice then refers to the application of the parties' intentions and conversely the intentions can be deduced from this application.[106] This school raises high the role the *travaux préparatoires* may play in the Charter interpretation. However, using *travaux préparatoires* as a means of determining the intentions of the original parties to a multilateral treaty such as the UN Charter can be a difficult and ambiguous task.

Aside these two competing schools of thought on how the UN Charter should be interpreted, it is to be noted that the notion of a "generally acceptable" interpretation has since been used in some cases by some of the organs of the UN, notably the Security Council.[107] By this notion, an interpretative decision of an organ may be supported unanimously by its members, by a large majority or by a simple majority. However, a simple majority may not necessarily suffice and the ensuing practice would not be considered legally relevant with regard to the interpretation of the instrument upon which the organ based its actions.[108] Hence, the degree of acceptability of an interpretation made by an organ of the UN depends on the amount of support received from the members of the organ concerned, and of the members of the UN not represented in the organ.[109]

[104] Malanczuk (1997) p.336
[105] Jennings and Watt (1996) p.1281
[106] Schweigman (2001) p.17
[107] Ibid, page 18
[108] Ibid.
[109] Ibid.

4.1.4 The Approach towards Interpretation Adopted in this Study

The discussion above indicates how the UN Charter may be interpreted using almost all the different paradigms of interpretation on different occasions. One thing though is imperative: the need to interpret the Charter placing emphasis on the object and purpose of the organization. I have therefore chosen to adopt the teleological approach in this study. Another motivation for this choice is the need to adapt to the changes occurring within international relations and the fast globalizing world today. There are some obvious changes now from what pertained in the early days of the UN, therefore there is the urge to interpret the Charter dynamically to enable it maximize its effectiveness. I must, however, emphasize that considering the complexity involved in the interpretation of treaties as well as constituent instruments; I will also pay attention to distinctive features of the Charter which may require special attention in interpretation and explore them accordingly. In this regard, I will also make recourse to some of the applicable provisions of the Vienna Convention on the Laws of Treaties. In no way do I intend the choice of the teleological approach as the absolute means of interpreting the UN Charter.

I should also mention some general consequences of this decision including the tendency to reduce the relevance of the preparatory work of the Charter as an interpretative aid, in favor of the subsequent practice of the organization. Again, since the UN is a highly politicized organization, interpretative decisions will usually be based on policy rather than legal considerations. Hence, there is a tendency among its organs not to mention the particular provisions upon which they have acted.[110] Furthermore, in placing emphasis on the object and purpose of the organization, one need not take this too far as to ascribe extensive powers to international organizations upon ambiguous grounds of, for example, effectiveness, since this will inevitably lead to conflict with member-states and third parties.[111] I am convinced that an interpretation of the powers and practices of the Security Council, in the light of the

[110] Ibid, page 20.
[111] Shaw (1995) p.778

illicit arms trade will be best served with regards to the object and purpose of the establishment of the Security Council.

4.2. The Authority of the Security Council under the UN Charter

The adoption of the UN Charter on the 25 June 1945 and its subsequent coming into force on 24 October the same year may be herald, if not the most important, as one of the important days of the 20th Century. This period willed into reality the unprecedented collective resoluteness of the founding fathers of the UN to, as can be read in the preamble of the Charter, "save succeeding generations from the scourge of war".[112] It is no gain-saying that, the maintenance of international peace and security was the ultimate purpose of the Organization.[113] The responsibility to ensure the fulfillment of this ultimate purpose is primarily entrusted into the hands of the UN Security Council.

4.2.1 Functions and Powers of the Security Council

The Security Council is one of six principal organs the United Nations established under Article 7 of the UN Charter. Its main functions and powers under the Charter are however contained in Articles 24 and 25. Paragraph 1 of Article 24 states that:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Conspicuously, paragraph 1 of Article 24 places the 'primary responsibility' for the 'maintenance of international peace and security' on the SC. Even though proposals were tabled during the United Nations Conference on International Organization (UNCIO) to provide for a larger role of the General Assembly, for several reasons these proposals were

[112] UN Charter, 1945, Preamble.
[113] Article 1 of the UN Charter, 1945

not adopted.[114] It has also been argued that 'it is impossible to conceive of swift and effective action if the decision of the Council must be submitted to ratification by the GA or if the measures adopted by the Council are susceptible of revision by the Assembly'.[115] This should not, however, be construed as excluding the GA from becoming active in the field of maintenance of peace and security under the general and specific powers conferred upon it. In fact, the GA has more than once demonstrated its concern in the maintenance of peace: the GA adopted the 'Uniting for Peace Resolution'[116] and the on-going 'Arms Trade Treaty'[117] process. There was general agreement on the paramount importance of the SC being placed in a position with the 'primary responsibility' to 'ensure prompt and effective action by the United Nations'.[118] Having 'primary responsibility' also endows the SC priority both in time and in substance over the GA, i.e. in this case a main responsibility with regard to taking effective and binding action, especially enforcement measures.

The first sentence of paragraph 2 also makes reference to the effect that in the discharge of its responsibility, the Council has to act in accordance with the purposes and principles of the organization. This, in concert with the first paragraph of Article 1, which stipulates that the Council shall act in conformity with the "principles of justice and international law" in settling a dispute, is often construed as placing limits to the powers of the Council. But commentators have noted that this does not automatically warrant the conclusion that the Council is bound by the "principles of justice and international law" in exercising its functions.[119] Again, a closer look at Article 1 shows that it distinguishes between collective measures in order to maintain and restore peace, and the peaceful settlement of disputes. Analysts therefore argue that the obligation to act in conformity with international law is only prescribed for the latter category but not the former. It is further submitted that should the Council be subjected to such limitations in the case of the former category, such limitations

[114] Schweigman (2001) p.27
[115] Ibid.
[116] UNGA Res. A/Res/377(V), 3 November 1950
[117] UNGA Res. A/Res/61/88, 6 December 2006
[118] Delbrück (2002) p.445
[119] Schweigman (2001), p.29

will not only have curtailed the Council's freedom of 'swift' action but would have been *ultra vires*.[120] It, however, conforms to current understanding that the Council has to observe 'at least the limits of the law of the Charter'[121] in exercising its functions.

Similarly problematic interpretation has also resulted from the provision of Article 24(1), according to which the SC, in discharging its functions for the maintenance of peace, acts on behalf of the member States. Some have interpreted this as meaning the SC in the discharge of its duties rests on a delegation of powers by the members.[122] But this way of interpretation is incorrect since the SC derives its powers from the UN Charter itself.[123] Even though decisions of the SC could affect those member States which are neither members of the SC nor agree to it, it remains an organ of the UN and accordingly acts on behalf of the Organization and not on behalf of individual member States.[124] Therefore, its actions and decisions are attributed to the UN Organization as a whole and not to individual members such as, for instance, the members of the Security Council.

The second sentence in paragraph (2) further makes reference to the 'specific powers granted to the Council for the discharge' of these duties in Chapters VI, VII, VIII, and XII. This raises a debate on whether the powers of the SC are limited to those enumerated above. Many have, however, argued that the granting of 'specific' powers logically presupposes that the organ holding such 'specific powers' also has 'general' powers as well.[125] Furthermore, listings of the powers in Article 24(2) is not to be taken as a final of powers conferred upon the SC because the Council has additional powers defined in other chapters of the Charter, notably Chapters IV, V and XIV. In addition, in its Advisory Opinion on Namibia, the ICJ held that the "reference in paragraph 2 of this Article 2(4) to specific powers of the Security

[120] Ibid.
[121] Delbrück (2002) p.445
[122] Ibid, page 448
[123] Ibid, page 449
[124] Ibid.
[125] Ibid, page 447

Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1."[126]

In Article 25, the powers of the SC were further legitimized and bolstered: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." It is to be acknowledged that what constitutes a 'decision' and how 'in accordance with the present Charter' should be interpreted are ongoing debates. While the Charter does not settle the former, the latter is often explained out as having to do with decisions made in consonance with the object and purpose of the Charter as found in its Article 1. Decisions by the SC are generally regarded as binding on member states and this seems like an unambiguous provision. But sometimes they are problematic. For instance, whereas it is generally acknowledged that the powers of the Council relating to the pacific settlement of disputes (Chapter VI of the Charter) are recommendatory, and necessarily non-binding, measures taken by the Council under Chapter VII of the Charter certainly fall into the category of binding decisions.

By and large, the binding nature of decisions made by the SC is upheld by the ICJ. The Court has held that "it is not possible to find in the Charter any support" for the contention that "Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter."[127] Hence the Court concluded that an interpretation that limits the domain of binding decisions to those decisions taken under Chapter VII would render Article 25 "superfluous, since this [binding] effect is secured by Articles 48 and 49 of the Charter."[128] This study therefore upholds that decisions or measures taken by the Council are binding on member states if the Security Council so decides.

[126] ICJ Advisory Opinion on Namibia
[127] Schweigman (2001) p.32
[128] Ibid.

4.2.2 Chapter VII: 'International Peace and Security'

Article 24(1) of the UN Charter bestows on the Security Council the primary responsibility for the maintenance of international peace and security. But in the discharge of its duties paragraph 2 of the same article requires the Council to act in accordance with the purposes and principles of the UN laid out in Article 1. It is argued that these are the only express limits to the power of the Security Council under the Charter. These powers may not be absolute but they are extremely far-reaching that they give the Council, in some degree, the role of an 'executive of the international community'.[129] In Chapter VII, thus, the Charter provides the Security Council it's most extensive powers subject to very few express limitations in pursuance of its responsibility for the maintenance of international peace and security under the title "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." To a certain degree, the Security Council's far-reaching power in the international order is shrouded in its ability to enforce laws, adjudicate, legislate, and administrate.

According to the system spelt out in this Chapter, the Council shall first decide whether a particular situation calls for action (Article 39). If such a situation has arisen, it may make recommendations (Article 39), take provisional measures (Article 40), or decide on enforcement measures not involving the use of force (Article 41), in order to remedy the situation. In the event these non-belligerent measures are ineffective, it may authorize measures involving the use of force, to put an end to a threat or breach of the peace or an act of aggression (Article 42). For instance, under Chapter VII enforcement measures are often taken explicitly in order to make states respect specific legal norms as with the enforcement of the Non-Proliferation Treaty in the Iraq case.[130] The council is thus the law enforcement organ of the international community in the area of peace and security.

[129] Dupuy (1997) p.21-24
[130] Frowein and Krisch (2002) p.707

Also, the Council's quasi-judicial function is largely seen in the requirement under Chapter VII to determine the violation of a norm in order to enforce the law. For instance, it determined that the annexation of Kuwait by Iraq or declarations and actions under duress in the Bosnian War, were 'null and void' and that Iraq was liable for damages in result of the invasion of Kuwait.[131] It is further argued that by taking binding measures under Chapter VII, the Council is authorized to create new law and thus to act, to a certain degree, as a legislator. In likewise manner, the Council has authorized the administration of territory as an enforcement measure under Chapter VII as in the cases of Kosovo and East Timor.[132] Since this study borders on the possibility for the Security Council to legislate on behalf of the UN Members in order to regulate the global arms trade, the legislative power of the Council is further discussed below.

4.2.2.1 The 'Legislative Power' of the UN Security Council

Just as the Security Council is endowed with the clout to enforce international law and adjudicate conflicts resulting from the application of international law, it is equally empowered to make decisions (make laws) under Chapter VII that will bind UN member states. Contrary to the opinion that 'Hard' or binding international law could be created only by states, whether through the adoption and ratification of treaties, the creation of customary law by means of general practices supported by *opinio juris*, or the creation of general principles of law, the Council has started legislating in recent times.[133] It must be recognized that under Articles 25 and 48(1) of the UN Charter, the Security Council can adopt decisions that are binding on UN members. Although non-members are not directly bound by the Charter, its Article 2(6) requires the Organization to 'ensure that' such states acts in accordance with the principles set out in Article 2 "so far as may be necessary for the maintenance of international peace and security."

[131] UNSC Res. S/Res./662/90, 9 August 1990; UNSC Res. S/Res./674/90, 29 October 1990
[132] Frowein and Krisch (2002) p.742
[133] Szasz (2002) p.901

However, these decisions must be taken in exercise of the Council's "primary responsibility for the maintenance of international peace and security" under Article 24(1), and their potential binding nature is clearest when taken under Chapter VII upon a determination by the Council that there exists "a threat to the peace, breach of the peace, or acts of aggression."[134] In this regard the Council has frequently, especially since the end of the Cold War, imposed economic sanctions or other restrictions requiring compliance by all states. By their nature these restrictions are imposed for a limited purpose – to secure compliance by a target state – and explicitly or implicitly are limited in time until that purpose is accomplished. These decisions of the Council cannot, therefore, be considered as establishing new rules of international law.[135] However, beginning from 28 September 2001, the Council, reacting to the events of September 11, departed from its previous limited and cautious practice.

The Security Council, for instance, adopted Resolution 1373 (2001) to counter the threat of terrorism, by which it decided in two operative paragraphs, "that all States shall" take certain actions against the financing of terrorist activities, as well as miscellany of other actions designed to prevent support for any terrorists and terrorist activities.[136] In addition, the resolution established a plenary committee of the Council (since referred to as the "Counter-Terrorism Committee") to monitor implementation of the resolution and called on all states to report on their compliance with it, initially within ninety days and thereafter according to a timetable to be proposed by the committee.[137] Resolution 1540 (2004) on Non-Proliferation of Weapons of Mass Destruction is the latest 'legislative' resolution from the Security Council.[138] The resolution, adopted under Chapter VII of the UN Charter, is legally binding on all UN member states, and obliges them to take a range of steps aimed at preventing the proliferation of nuclear, chemical and biological weapons, their delivery systems and related

[134] UN Charter Article 39
[135] Szasz (2002) p.902
[136] UNSC Res. S/Res/1373/2001, 28 September 2001, paragraphs 1-2
[137] Ibid, paragraph 6.
[138] UNSC Res. S/Res/1540/2004, 28 April 2004

material, especially by non-state actors.[139] The resolution also creates a committee of the Council to monitor its implementation.

In a briefing on the Council's schedule for April 2004, its President, referring to the plan adoption of Resolution 1540, described the ongoing consultation for that resolution as "the first step towards having the Security Council legislates for rest of the United Nations' membership." He explained that "[Resolution] 1373 had been the first step" and that the "Council would be needed more and more to do that kind of legislative work."[140] Furthermore, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1995 held in the *Tadić* case: "There is […] no legislature, in the technical sense of the term, in the United Nations system. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects."[141] In this case, it may be argued that while the powers of the Security Council may be subject to, if any, few express limitations, the Council certainly enjoys extensive clout in its appreciation of what constitutes a threat to the peace, and thus justifies the exercise of its special lawmaking powers.

However, any categorical assertion that seeks to suggest that the Council enjoys unfettered discretion may not go unchallenged, as has been indicated by the ICJ that the latter's decisions may be subject to judicial review.[142] For instance, in the *Lockerbie* case, the ICJ ruled it admissible even though it was already seized upon by the SC.[143] It should be noted that while the SC may enjoy priority on issues regarding international peace and security over the GA, such competence of the SC vis-à-vis the ICJ, however, can not find support in any other Charter provisions or any general principles of law.[144] Thus, no objection of *lis pendens* or *res judicata* may be raised against the ICJ acting simultaneously (or prior to or

[139] Ibid.
[140] Talmon (2005) p.175
[141] Prosecutor v. *Tadić*
[142] ICJ Advisory Opinion on Namibia
[143] Schweigman (2001) pp.63-67
[144] Delbrück (2002) p.447

after the SC) in a case pending before the SC.[145] The procedures of the SC and the ICJ have to be recognized as being independent of one another and would have to take each other's decisions into consideration.[146] However, recourse to Article 103 of the UN Charter reveals that, in the event of conflict between a request and the Rome Statue, the request will prevail. In the *Lockerbie* case, for instance, the ICJ held that obligations imposed by the Council take precedence over obligations under international treaties.[147] Evidence of this fact may be drawn from the basis that the case has since become moot in the Court since the Council took further action against Libya.

It is also vital that one does not remain oblivion of some of the general objections that may be raised to Security Council legislation. First, a patently unrepresentative and undemocratic body such as the Council is arguably unsuitable for international lawmaking.[148] However, valid as this objection may be, it could also be made to any other Council action. Yet it can hardly be maintained that authorizing the use of force requires less democratic legitimacy than imposing a general obligation to prevent and suppress the financing of terrorist acts.[149] Second, Council practice may be criticized as contrary to the basic structure of international law as a consent-based legal order. But any such view may be deemed to overlook the nature of all binding decisions of the Council as, according to Article 25 of the UN Charter, based on the consent of the member states.[150] Finally, the assumption of legislative powers by the Council may be said to be hard to reconcile with its general role under the Charter as a "policemen" rather than a legislature or jury. However, it must be noted that the powers of the Council are to be determined not by reference to its general role but on the basis of the provisions of the UN Charter.[151]

[145] Ibid.
[146] Ibid.
[147] See Libya v. UK; Libya v. US
[148] UNGA Doc. A/56/PV.36, 1 November 2001
[149] Talmon (2005) p.179
[150] See Article 25 of the UN Charter.
[151] Talmon (2005) p.179

4.2.2.2 Articles 39, 40, and 41

According to Article 39, it is incumbent on the Council to determine the existence of any threat to the peace, breach of the peace or act of aggression:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

However, how international peace – and subsequent threats to and breaches of it – is to be defined remains a problematic task. The Charter itself is silent on the term, and the *travaux préparatoires* indicate that this was done deliberately.[152] It is worth remembering that after a long debate surrounding what constitute a 'threat to or breaches' of the peace during the UNCIO, it was decided "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression."[153] Endowed with such discretionary powers, Malanczuk puts it that: "a threat to the peace seems to be whatever the Security Council says is a threat to the peace".[154] While it may be plausible to acknowledge the skepticism surrounding the extensive interpretation of a 'threat to the peace', it may be also argued that it allows the Council to adapt Article 39 to the changing times and changing problems of international concern.

Some authors have long argued that at the time of the drafting of the UN Charter what were considered to constitute "threats to the peace" were arguably military threats to international peace.[155] Today, however, it has become almost a tautology to point out that not only military but also social, political, economic, humanitarian, ecological and other non-military

[152] Schweigman (2001) p.34
[153] Ibid.
[154] Malanczuk (1997) p.426
[155] Österdahl (1998) p.18

factors may constitute threats to the peace, domestic or international.[156] At the first meeting of the Security Council at the level of Heads of State and Government in January 1992, it was acknowledged that "The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security."[157] By and large, the express incorporation of the threat to the peace makes Article 39 applicable even before armed conflicts break out. Subsequently, and as will be discussed in the next section of this chapter, the practice of the Council certainly indicates how it has extensively interpreted what constitutes a threat to the maintenance of international peace and security.

In addition, the notion of an 'international' or 'domestic' threat to the peace merits discussion here. "Threat to the peace" as mentioned in Article 24(1) often regarded as relating solely to interstate relations, from the formal point of view and also international law in general, has also undergone radical changes since the UN Charter was drafted. The Council's practices depict that it takes into consideration as a "threat to the peace" also a situation which emanates from within one country only and which does not really threaten anything more than the domestic peace of one country.[158] Perhaps the pulling factor for this practice on the part of the Security Council is the fact that sooner or later some of these conflicts escalate beyond internal borders and become threats to neighboring countries. For instance, in Africa, primarily but not exclusively, the fact that the domestic conflicts are often ethnically based, together with the fact that the same people often live on either side of official boundaries separating states, easily contribute to making domestic conflicts indirectly international.

Article 40 also gives the Security Council the clout to take what it refers to as 'provisional measures' prior to the measures contemplated in Articles 41 and 42:

[156] Michael T, et al (1994)
[157] UNSC Doc. S/23500 of 31 January 1992, page 3
[158] Österdahl (1998) p.19

> In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

It appears obvious to say that the purpose of these provisional measures is to prevent an aggravation of the situation. Doubts, however, hang on whether these provisions require a prior determination of the Council pursuant to Article 39 as well as the binding character of these measures. It has been argued elsewhere that once Article 40 is under Chapter VII and not Chapter VI, the view that these provisional measures can only be adopted if the requirements of Article 39 are met, in other words if there exists at least a threat to the peace, is the most plausible. Besides, it would be reasonable to argue that all actions under Chapter VII shall be subject to that requirement. Therefore, depending on the intentions of the Council, it may both make recommendations and take binding decisions under Article 40.[159]

In dealing with non-belligerent situations, the Security Council is empowered by Article 41 to decide what measures are necessary to give effect to its decisions:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

This Article, often regarded as the cornerstone of the new system of collective security of the UN, allows the Council to take concrete steps, sometimes in the form of ‘targeted’, ‘smart’ sanctions, which affect those responsible for the breach of the peace without adversely

[159] Ibid, pp.740-744

affecting bystanders.[160] Thus, this article provides the legal basis of making decisions on all non-military issues as well as taking of measures to ensure their implementation. These measures - which may include but not limited to those identified in the Article 41 - are not dependent on a prior application of provisional measures under Article 40.[161] The implication is that if the requirements in Article 39 are met, the Council can make a decision and determine which measures to employ in other to implement its decision to maintain or restore the peace. In the past, the Security Council has invoked this power in different ways including; economic and diplomatic restrictions, the creation and determination of legal obligations of the targeted state, the creation of the international criminal tribunals, and international administration of territories.[162]

4.3 Application of the UN Security Council's Power: Three Cases

The foregoing overview of the powers and functions of the Security Council as ascribed to it by the UN Charter; particularly Chapter VII, underscores the seemingly limitless powers the Council wields. This section will analyze three cases to highlight the various ways the Council has function with regards to what constitutes a 'threat to the peace' and what measures were employed to restore or remove such threats. These cases are intended to underscore the extensive ways in which the Council has and can determine a situation, not necessarily military in character, as a threat to the peace. This will provide the framework for the subsequent interpretation of the illicit trade in small arms and light weapons (SALW) as a threat to the peace and therefore subsume it under the focus of the Security Council.

4.3.1 Libya and the Lockerbie Incident 1988-2000

The infamous *Lockerbie* incident happened on 21 December 1988 during which Pan Am Flight 103 exploded over Lockerbie, Scotland, killing all 259 passengers and 11 local

[160] Frowein and Krisch (2002) p.739
[161] Schweigman (2001) p.37
[162] Frowein and Krisch (2002) pp.741-745

residents.[163] Three years later, the Security Council, through resolution 731 (1992), after the UK, the US, and France presented their cases to the Council, urged the Libyan government to extradite its nationals allegedly responsible for placing a bomb on the flight. The Libyan government instead presented the case to the International Court of Justice based on the 1971 Montreal Convention, after it denied the Council's request. The ICJ upon further consideration of the issue ruled that the case was admissible. During the proceedings, Libya asked the Court to indicate interim measures of protection so as to ensure that the US and the UK would not take any action against Libya with regard to the extradition of its nationals. Even before the Court could make a decision on the request by Libya, the Security Council determined by resolution 748 (1992) that the non-extradition of the Libyan nationals constituted a threat to international peace and security:

> In this context that the failure by Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular, its continued failure to respond fully and effectively to the requests in Resolution 731 (1992), constitute a threat to international peace and security.[164]

The Council, in the same resolution demanded that Libya extradite the suspects, with the imposition of sanctions as the repercussion for failure to do so. With Libya remaining defiant in the face of the Council's demands, the sanctions – calling on all states to adopt coercive measures (including an aerial, arms embargo and diplomatic sanctions) against Libya - became operative in April 1992. In November 1993 the Council reviewed the situation and determined in the preamble of resolutions 883 (1993) that Libya's non-compliance with resolution 731 (1992) and 748 (1992) constituted a "threat to international peace and security."[165] The Council further tightened the sanctions to include urging all states to freeze Libyan funds and resources abroad in addition to other economic sanctions.[166] The sanctions

[163] Schweigman (2001) p.63
[164] Ibid, p.65
[165] UNSC Res. S/883/1993, 11 Nov. 1993
[166] Ibid, pp.3-6

were only suspended after years of negotiations which resulted in a compromise between Libya, the US and the UK to try the suspects in the Netherlands.[167]

In analyzing this case, two questions need answering: what brings this case under the jurisdiction of the SC; and by what procedure it took action. On the former question, it may be argued that it is a case involving international terrorism, one that poses a threat to the peace. On the latter, it must be noted that the council first adopted resolution 731 (1992) under Chapter VI of the UN Charter in which it 'strongly urged' Libya to comply with the extradition requests made by the US and the UK. Haven failed to comply with the non-binding appeal, and rather going to the ICJ, the Council adopted resolution 748 (1992), in which it invoked Article 39 by determining that the non-compliance by Libya with the requests contained in resolution 731 (1992) constituted a threat to international peace and security. In the same resolution, Libya was requested to act within a stipulated time frame or face sanctions under Article 41.

As Libya defiantly refused to comply, the sanctions became operative in April 1992. Resolution 883 (1993) was further used by the Council to reiterate its earlier Article 39 determination that the non-extradition of its nationals by Libya constituted a threat to international peace and security and imposed additional sanctions under Article 41. Parallel to the Libyan case, the SC determined that Sudan's harboring of alleged terrorists who attempted to assassinate the president of Egypt Hosni Mubarak in Ethiopia in 1995, is a threat to the peace.[168] As Sudan remained defiant in the face of the Council's requests, the Council imposed sanctions on Sudan including arms embargo.

[167] UNSC Res. S/1192/1998, 27 August 1998
[168] UNSC Res. S/1044/1996, 31 January 1996

4.3.2 Rwanda 1993-1996

The 1990 ethnically motivated civil war in Rwanda between the Hutu-dominated government forces and the Tutsi Rwandese Patriotic Front (RPF) resulted in the loss of an estimated 500,000 - 1,000,000 lives.[169] After initially confining itself to expressions of concern regarding the situation in Rwanda, the Security Council made a formal determination that "the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region" in resolution 918 (1994).[170] In the same resolution the Council also claimed to be "deeply concerned by the continuation of the systematic and widespread killings of the civilian population in Rwanda".[171] The Council imposed an arms embargo on Rwanda in the same resolution. It must be noted that prior to this, the Council had already sent two peacekeeping missions to Rwanda: the United Nations Observer Mission Uganda-Rwanda (UNOMUR); and the United Nations Assistance Mission for Rwanda (UNAMIR).[172] In the wake of the unsuccessful operations of the aforementioned forces, the Council authorized a multilateral force to intervene in Rwanda, unfortunately, only after the worst atrocities had already occurred. Indeed, the failure of the United Nations as whole but the Security Council in particular to prevent the genocide in Rwanda has been recognized by the Organization itself.[173] The Security Council not perturb by all the previous shortcomings decided to establish an international Criminal Tribunal for Rwanda (ICTR) by resolution 955 (1994), shortly after some semblance of stability returned to Rwanda as a result of the victory of the RPF.

This case points to other pertinent issues that often invoke the use of powers of the Security Council: humanitarian law, genocide and crimes against humanity. Under Article 39, the Council determined in resolution 918 (1994) that the situation in Rwanda constitutes 'a threat

[169] Karhilo (1995) p.687
[170] UNSC Res. S/912/1994, 22 June 1994
[171] Ibid, paragraph 8
[172] UNSC Res. S/846/1993, 22 June 1993; and UNSC Res. S/872/1993, 5 October 1993
[173] UNSC Res. S/340/1999, 26 March 1999

to the peace and security in the region'. The Council further established arms embargo as well as the ICTR as a measure under Article 41; and then authorized intervention in Rwanda as a measure taken under Article 42. In a similar fashion, the Security Council earlier on established the International Criminal Tribunal for former Yugoslavia (ICTY) to address the issue of violations of humanitarian law by the parties to the Yugoslav conflict.[174]

4.3.3 The HIV/AIDS Epidemic in Sub-Saharan Africa

The determination of the HIV/AIDS epidemic in Sub-Saharan Africa as a threat to international peace and security is just another attestation to the extensive powers of the Security Council to determine a situation as a 'threat to the peace'. This determination, just like many others, was not without any initial disagreement. After the initial reluctance of the UK, France, China and Russia, during the 4087th meeting of the Security Council in which the US made a case for the consideration of the HIV/AIDS epidemic in sub-Saharan Africa as a security threat, they came to agree as much a year later.[175] The formal case was made by the former US Vice President Al-Gore when he presided over the Council's meeting on 10 January 2000. He outlined a three point syllogistic argument for the proposition as follows;

1. "The heart of the security agenda is protecting lives"
2. "When a single disease threatens everything from economic strength to peacekeeping, we clearly face a security threat of the greatest magnitude"
3. "It is a security crisis because it threatens not just individual citizens, but the very institutions that define and defend the character of a society".[176]

When an agreement was eventually reached among the Council Members, resolution 1308 (2000) acknowledged the HIV/AIDS security nexus: "Recognizing the HIV/AIDS pandemic

[174] UNSC Res. S/764/1992, 13 July 1992
[175] Gwyn (2006) p.225
[176] Ibid.

is also exacerbated by conditions of violence and instability" and the converse: "stressing that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security."[177]

In addition, the resolution expressly included the encouragement of member states to increase international cooperation among their relevant national bodies to assist with the creation and execution of policies for HIV/AIDS prevention. In addition, it has urged further discussion among relevant United Nations bodies, Member States, industry and other relevant organizations to make progress, inter alia, on the question of access to treatment and care, and on prevention. Some have argued that the securitization of AIDS in international fora has been motivated by the human security concept interpreted principally as an extension of the responsibility to protect human rights.[178] The determination of the HIV/AIDS epidemic as a 'threat to the peace' by the Council, proved to be a very difficult and touchy subject. For instance, when Richard Holbrooke, the Clinton administration's ambassador to the UN, was reported to have made a phone call to Kofi Annan, the then UN Secretary General, telling him "we had to have a Security Council meeting on AIDS", Kofi Annan was equally reported to have first retorted "we can't do that. AIDS isn't a security issue."[179]

[177] UNSC Res. S/1308/2000, 17 July 2000
[178] Gwyn (2006) p.227
[179] Ibid, pp.224-225

CHAPTER FIVE

5. Discussion and Analysis of Research Questions

The object of this chapter is to undertake a thorough discussion and analysis, first, in determination of the extent to which the current 'global arms trade' may qualify as a 'threat to the peace' under Article 39 of the UN Charter and subsequent practice of the UN Security Council; and second, what enforcement measure(s) may be available to and within the power of the Security Council should the arms trade be deemed a threat to the peace.

5.1 The Global Arms Trade as a Threat to the Peace

Direct military threats on the part of one state against another state have long been held as constituting the traditional notion of threats to international peace and security. However, since the end of the Cold War the Security Council has generally widened its interpretation of the notion of threat to the peace in Article 39 under Chapter VII of the UN Charter. For instance, the Council's practice with respect of the interpretation of Article 39 implied that, *inter alia*, civil wars, serious human rights violations, lack of democracy, terrorism and serious violations of international humanitarian law do constitute real threats to international peace and security and give rise to a "threat to the peace" under Article 39. Thus, the practice of the Council has further expanded the notion of threat to the peace beyond specific concrete situations to more generally abstract situations.

It must be acknowledged that there are cases where the Security Council has not intervened. But, a close look at both cases where the Security Council acts, in particular, in the cases considered in this study and in cases where it does not, as with the arms trade, the real question would be whether there was a threat to the peace. In both cases, however, it is not impossible to determine whether or not, in the short run or in the long run, the situations do really constitute threats to international peace and security. It is often argued that where the Council did not consider a situation as serious was almost certainly based on completely

different premises, *inter alia*, the existence of the veto and lack of resources but not that there really is no threat to the peace either in the short run or long run.[180] But the recent practice of the Council with respect to whether there really exists a threat to the peace suggests not only which kinds of situations may lead to international armed conflict. The presumption here is that "threat to the peace" in Article 39 means a threat to international peace.[181]

In relation to this presumption, two features have come to characterize the situations that have been determined by the Council as constituting a threat to the peace. The first feature is in what way "peace" itself is defined; whether it is defined narrowly, as the absence of war, or broadly, as not only the absence of war but also as the presence of certain positive social, economic, humanitarian and ecological circumstances.[182] A look at the three cases discussed in this study shows the Council's practices embrace the latter definition. In the said cases, civil war, states' reluctance to act in the face of terrorism and a health situation have all been deemed as a threat to international peace. In many other cases not discussed in this study, similar abstract situations have also been regarded as such.[183] The other feature has to do with the severity of the danger a situation poses to the peace. An examination of the cases discussed reveals that chances are quite high that once the Security Council does decide to determine the existence of a threat to the peace it is a serious enough situation to deserve the epithet "threat to the peace".[184] For instance, genocide, terrorism and HIV/AIDS have all been regarded serious enough situations to be a threat to the peace in the cases discussed.

The global arms trade, just like many of the situations discussed above may not be categorized under a typical 'traditional' notion of what constitutes a threat to the peace. However, in many diverse ways it constitutes a threat to international peace and security. In the first instance, the UN has admittedly conceived illicit arms trafficking as an issue of law

[180] Österdahl (1998) p.87
[181] Ibid.
[182] UNSC Doc. S/23500, 31 January 1992, p 3
[183] Österdahl (1998) pp. 43-79
[184] Ibid, p.88

enforcement and crime control.[185] It has been linked to drug trafficking, terrorism, money laundering, international organized crimes and other clandestine activities. Similarly, almost all the regional initiatives equally acknowledge the intrinsic role arms trafficking has in the above mentioned crimes. Security Council resolution 1373 (2001), in paragraph 4, for instance, notes with concern, the close connection between international terrorism and trans-national organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials.

In the second instance, it is linked to the integrated approach,[186] which regards illicit trafficking in arms as a phenomenon that undermines peace, structural stability and long-term development. The destabilizing effect of trafficking in SALW is no more in doubt. In Africa where its adverse effect is nothing but vicious, SALW remain the main weapons of choice used in almost all the wars fought since the 1990s and the conflicts still on-going. In the Americas, they are weapons of choice for drug cartels and a great source of insecurity. The SALW have been labeled as the real 'weapons of mass destruction' of our time with the illicit arms trade labeled as an 'on-going slaughter' that needs to be stopped immediately. It is my submission therefore that whiles the arms trade, and for that matter arms trafficking, may not belong to the narrow definition of peace, it definitely belongs to the broad definition and is conspicuously serious enough to be determined as a threat to the peace.

Furthermore, as already indicated in chapter three, a number of initiatives have since the late 1990s been pursued not the least by various United Nations organs and specialized agencies in the attempt to combat the dangers arms trafficking pose to world stability and peace. A number of panel of expert groups on SALW have over the last two decades been founded to provide expert advice on the issue. A UN sponsored conference and a number of seminars have also undertaken extensive deliberations on the issue. Three international instruments and a series of resolutions, mostly non-binding, are currently in place seeking to deal with

[185] UNGA Res. A/55/25, 15 November 2000
[186] First proposed in 1997 by a United Nations panel of governmental experts on small arms, and reiterated in 1999 by a follow-up group of experts.

various aspects of the arms trade. The adoption of the UNGA resolution to start the process on an Arms Trade Treaty in December 2006 is the only initiative seeking to comprehensively address the problem. Similar actions have also been pursued in regional and sub-regional levels.

5.2 The Security Council to Legislate to Regulate the Arms Trade

As a direct consequence of the widening of its repertoire of what constitutes a threat to the international peace, the Security Council has also expanded the arsenal in its tools kit with respect to the breadth of enforcement measures available for giving effect to its decisions under Chapter VII. At the same time, it can be noted that in some of the cases where the Council has determined the existence of a threat to the peace it has not taken any enforcement measures at all to eliminate the threat.[187] This was the case with respect to the HIV/AIDS epidemic in sub-Saharan Africa. In most cases, however, the Council has followed up its determinations with decisions on enforcement measures, especially non-military, of varying degrees of severity. In the case of Rwanda for instance the Council begun by instituting an arms embargo, authorized a multilateral intervention and later established an international criminal court for Rwanda. In some cases, and after some display of disrespect for the decision of the Council on the part of the authorities in the country concerned, as in the case of Libya in the *Lockerbie* case, a set of comprehensive economic and diplomatic sanctions are imposed.

Up until its first legislative resolution of 1373 in 2001, the Security Council's arsenal of enforcement measures involving non-military measures have largely been of law enforcement and judicial character. But resolutions 1373 and 1540, herald the dawn of an era of legislative activity of the Council. These two resolutions give rise to two interrelated questions as far as this study is concerned. First, is the Security Council endowed with the power to undertake lawmaking as an enforcement measure under Article 41 and, second, can

[187] Österdahl (1998) p.82

obligations of a general and abstract character such as to criminalize a certain behavior and to enact certain laws be subsumed under the term "measures" in the sense of Article 41of the Charter?

In the former question, though disagreements exist among international lawyers on the legislative powers of the Council, the Council conceives such powers on the basis of its primary responsibility for the maintenance of peace and security as spelt out under Article 24 of the UN Charter. In Chapter VII, the Council can take binding decisions not involving the use of force under Articles 39 and 41 and may call upon all states to take certain measures. And these decisions by the Council may border on law enforcement, adjudication, administration or lawmaking. Perhaps the real question should concern rather whether or not the rest of the UN member states outside the fifteen composing member states of the Security Council will willingly accept and implement such legislation from the Council? By the provisions in Article 25 of the UN Charter, one may argue that member states, by giving the Council the responsibility to maintain international peace and security in Article 24, have also agreed to accept and carry out the decisions of the Council in accordance with the present Charter. In the case of resolution 1373, its adoption was widely welcomed by the UN member states and with no speaker expressing concern that the Council was legislating for the international community.[188]

On the latter question, one may argue that once general phenomena as threats to the peace find acceptance under Article 39, the Security Council may equally choose to impose obligations of a general and abstract character on member states under Article 41. The fact that the obligations imposed in resolutions 1373 and 1540 are more akin to obligations entered into by states in international agreements should not be a problem as long as they are comprehensive and within the limits of the Council. In any case, the term "measures" is wide enough to include both specific and general obligations. Besides, the list of measures in

[188] UNGA Doc. A/56/757, 26 December 2001

Article 41 is not exhaustive, as the formulation "may include" shows. This interpretation has been confirmed in the *Tadić* case where the appeals chamber of the ICTY held that "It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the article requires is that they do not involve "the use of force."[189]

The relative success of resolutions 1373 and 1540, in terms of their acceptance by the remaining UN member states, is an indication to the fact that if used properly, this process of lawmaking by the Security Council can provide the Council a useful means of responding swiftly to abstract threats, as in the case of the global arms trade, to international peace and security. The severity of the danger pose by the arms trade is comparable and connected to those pose by terrorism and weapons of mass destruction. In addition, it has been argued that the substantive rules imposed on all states in resolutions 1373 and 1540 were not suddenly invented by the Council but were based, albeit somewhat loosely, on prior resolutions of the General Assembly adopted unanimously or by overwhelming majorities.[190] Even though the Security Council is not obligated to adopt this approach, in the case of the arms trade, it would have a number of relevant resolutions and international instruments to work with should it choose to do so. Furthermore, considering the overwhelming support for the ATT idea, any attempt by the Security Council to put in place a similar mechanism to combat the illicit arms trade would not be met with any insurmountable opposition. A more broadly and participatory consultative process through the Security Council would be swifter and best suited than the ATT process.

[189] Prosecutor v. *Tadić*
[190] Szasz (2002) p.903

CHAPTER SIX

Summary and Conclusion

6.1 Summary

The discussion on the global arms trade and its human cost in chapter two points to how complex but even more dangerous the arms trade has become since the 90s. In contrast to weapons systems that can be prohibited outright, small arms and light weapons have a range of legitimate uses involving both public and private actors (police, military, and civilians). Therefore, there is the need for a legitimate trade in and transfer of SALW. However, it is also a fact that small arms and light weapons proliferation is no more merely a security issue. The carnage, terror, and the erosion of socio-economic development being made possibly through the illicit transfers of SALW call for urgent global controls to arrest the situation. The illicit arms trade is a tragedy that takes place every day with no immunity for neither anybody nor any country.

In chapter three we see an overview of the efforts to combat the illicit trade in arms thus far. Parallel efforts continue to occur within countries and regions, while being complemented by international momentum, although less perfectly than desired. Thus state regulatory systems have proven insufficient and ineffective. Regional initiatives abound now with moderate successes in tackling the global problem in the various regions. Some progress has also been made in the last decade within the UN framework with three international instruments to deal with the problem in addition to the largely flouted UN Security Council arms embargoes. The ATT process remained the only hope for the enactment of a holistic internationally binding instrument to regulate the arms trade. Yet, hope in the UNGA initiated ATT process is fast diminishing as the consensus bound process, almost three years on, is still faced with lack of commitment to start negotiating for an ATT. Therefore, some intervention to keep this ATT idea from falling apart would be urgently required from the Security Council. After all, the Council has the primary responsibility under the UN Charter to take enforcement measures against all threats, including those pose by the illicit trade in SALW, to the peace.

Chapter four has also been very insightful for a number of reasons. First, it underscores the fact that while there may be different ways to interpret the powers and practices of the Security Council, doing so within the framework of the object and purpose of the Charter establishing the Council will enable it to be dynamic in dealing with present and future threats. Second, the chapter highlights the fact that in pursuance of its primary responsibility to maintain international peace and security, the Security Council is given its most extensive powers under Chapter VII subject to very few express limitations. The Council has the clout to determine a situation as a threat to or breach of the peace or as an act of aggression under Article 39. It may employ interim measures under Article 40 or take enforcement measures, including legislation making, on non-belligerent issues under Article 41 to give effect to its decisions. Finally, in practice, as the case studies indicate, the Council has demonstrated the endless nature of issues that may pose a threat to the maintenance of international peace and security, including both abstract and specific threats to the peace. Thus, 'threat to the peace' is a constantly evolving concept. The cases also highlights the far-reaching range of possible enforcement measures the Council is capable of employing to give effect to its decisions.

6.2 Conclusion

Indeed, trafficking in arms is a consequence of the proliferation of small arms and light weapons and of the absence of adequate legislation in the areas of SALW controls, import/export and border control. Both explicit and implicit acknowledgement of the severity of the dangers the current global trade in arms poses to national, regional and international peace and security evidently abound in the series of initiatives, although inadequate, being pursued from the individual national arena through to the global arena. It is no gain-saying that one of today's most immediate threats to international peace and security in the 21st Century remains proliferation of small arms and light weapons, made possible through the illicit arms trade. It is therefore incumbent on the Security Council to prioritize and acknowledge the arms trade as a threat to the peace.

Subsequent to any such acknowledgement by the Council would be the imperatives for the Council to take immediate but comprehensive steps to deal with the threats. In resolutions 1373 and 1540, the Security Council has set a robust precedence. The Security Council is once again called to duty as the custodian of international peace and security. Legislating again, this time, to counter the adverse effect the global arms trade is having on international peace and security would be a matter of necessity. For inaction on the part of the Council, with respect to the destabilizing effects of the current global arms trade, would not only deprive the world any semblance of peace and security but it would also render the fulfillment of the Security Council's present day primary role in the maintenance of international peace and security questionable.

It is my submission that the current unregulated global arms trade is a threat to international peace and security. That the severity of the threats pose by the arms trade is evident in its adverse effects on socio-economic developmental efforts; and how it fuels other related threats as in drug trafficking, money laundering, terrorism, intra-state conflicts and the violation of both humanitarian and human rights laws. The Security Council should therefore determine the current global arms trade as a threat to the peace. It is also my submission that the Security Council should follow up its determination of the arms trade as a threat to the peace with another legislative act akin to resolutions 1373 and 1540, this time to counter the threats posed by the arms trade to international peace and security.

It must be acknowledged, however, that even though this study provides strong evidence in support of its conclusion, its main weakness remains the fact that it falls short of discussing the possibility of the use of the veto power by any of the permanent members in the case of the arms trade. Resolutions 1373 and 1540 may have passed this test but that may not be the case for subsequent Security Council legislative resolutions. Further study is hence required in this regard.

Bibliography

Books

Bix, Brian. *Law, Language, and Legal Determinacy*. Oxford, (Oxford University Press) 1993

Coe, Jim and Henry, Smith. *Action against Small Arms: A Resource and Training Handbook.* Oxfordshire (Information Press Eynsham) 2003

Dixon, Martin. *Textbook on International Law*. Oxford, (Oxford University Press) 1996

Jennings, Robert. Y. and Arthur. *Watt. Oppenheim's International Law*. London, (Longman) 1996

Dyer, Susannah, and Geraldine, O'Callaghan. *Combating Illicit Light Weapons Trafficking: Development and Opportunities*. London, (British American Security Information Council) 1998

Fitzmaurice, Gerald. *The Law and Procedure of the International Court of Justice.* Cambridge, (Grotius Publications) 1986

Hazdra, Peter (Ed). *Small Arms – Big Problem: A Global Threat to Peace, Security and Development*. Vienna, (Schriftenreihe der Landesverteidigungsakademie) 2007

Lumpe, Lora (Ed). *Running Guns: the Global Black Market in Small Arms*. London, (Zed Books) 2000

Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. London, (Routledge) 1997

Michael T. Klare and Daniel C. Thomas (Eds). *World Security: Challenges for a New Century*. New York, (St. Martin's Press) 1994

Österdahl, Inger. *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*. Uppsala (Och Iustus Förlag) 1998

Rosenne, Shabtai. *Developments in the Law of Treaties 1945-1986*. Cambridge, (Cambridge University Press) 1989

Schweigman, David. *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*. The Hague, (Kluwer Law International) 2001

Shaw, Malcolm N. *International Law*. Cambridge (Cambridge University Press) 1997

Tealakh, Gali Oda, Atef Odibat and Maha Alshaer (Eds.). *Small Arms and Light Weapons in the Arab World: National and Regional Measures*. Amman, (The Regional Security Centre at the Jordan Institute of Diplomacy) 2002

Articles and Papers

Delbrück, Jost. *Article 24*. In: The Charter of the United Nations: A Commentary. Oxford, (Oxford University Press) 2002. Pp.442-452

Dhanapala, Jayantha. *Multilateral Cooperation on Small Arms and Light Weapons: From Crisis to Collective Response*. In: Brown Journal of World Affairs. Volume IX (2002), pp.163-171

Dupuy, P. M. *The Constitutional Dimension of the Charter of the United Nations Revisited*. In: Max Planck UNYB 1 (1997), pp.21-24

Emanuela-Chiara Gillard. *What's Legal? What's Illegal?* In: Running Guns: the Global Black Market in Small Arms. London, (Zed Books) 2000. Pp.27-52

Frowein, J. A. and Krisch, N. Article 41. In: the Charter of the United Nations: A Commentary. Oxford, (Oxford University Press) 2002. Pp.701-763

Gwyn, Prins. *AIDS and Global Security*. In: The Geopolitics Reader. New York, (Routledge) 2006. Pp.224-228

Karhilo, Jaana. *The Establishment of the International Tribunal for Rwanda*. In: 64 NJIL (1995) 683-713

Koskenniemi, Martti. *The Place of Law in Collective Security*. In: MJIL, Vol. 17, (1996) pp. 455-490

Kramer, Katherine. *Legal Controls on Small Arms and Light Weapons in Southeast Asia.* Occasional Papers No. 3. Geneva, (Small Arms Survey) 2001

Laurence, Edward J. *Shaping Global Public Policy on Small Arms: After the UN Conference.* In: Brown Journal of World Affairs. Volume IX (2002), pages 193-202

Meek, Sarah. *Combating Arms Trafficking: Progress and Prospects.* In: Running Guns: the Global Black Market in Small Arms. London, (Zed Books) 2000. Pp.183-206

Ress, Georg. The Interpretation of the Charter. In: The Charter of the United Nations: A Commentary. Oxford, (Oxford University Press) 2002. Pp.13-32

Selected UN Documents. *Small Arms and Light Weapons*. New York, (United Nations Publication) 2008

Singh, Jaideep, and Widome, Daniel. *At Gunpoint: The Small Arms and Light Weapons Trade (Introduction).* In: Brown Journal of World Affairs. Volume IX (2002), pp.159-161

Small Arms Survey: *Shadows of War*. Cambridge, (Cambridge University Press) 2009

Small Arms Survey: *Guns and the City*. Cambridge, (Cambridge University Press) 2007

Small Arms Survey: *Unfinished Business*. Oxford, (Oxford University Press) 2006

Small Arms Survey: *Counting the Human Cost*. Oxford, (Oxford University Press) 2002

Small Arms Survey: *Profiling the Problem*. Oxford, (Oxford University Press) 2001

Szasz, C. Paul. The Security Council Starts Legislating. In: the American Journal of International Law. Notes and Comments. Vol. 96, (2002) pp. 901-905

Talmon, Stephen. *The Security Council as World Legislature.* In: the American Journal of International Law. Notes and Comments. Vol. 99, (2005), pp.173-193

List of Judgments/Decisions

The Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 8 July 1996, ICJ Rep. (1996)

The Case concerning Oil Platforms (Pre. Obj.), Iran v. US, ICJ Rep. (1996), para. 23 at 812

Prosecutor v. *Tadić*, Appeal on Jurisdiction, No. IT-94-I-AR72, (1995), para. 43

The Case concerning the Arbitral Award of 13 July 1989 (Judgement), Guinea-Bissau v. Senegal, ICJ Rep. (1991), para. 48 at 20-21

Advisory Opinion on Namibia. 21 June 1971, ICJ Rep. (1971), para. 110, page 54

The US v. Libya; the UK v. Libya, ICJ REP. 3 & 114 (14 April 1992)

Reparations for Injuries, ICJ Reports (1949), p.179

Treaties/Statutes

Preamble of the United Nations Charter, San Francisco 26 June 1945

Article 1 of the United Nations Charter, San Francisco 26 June 1945

Article 25 of the United Nations Charter, San Francisco 26 June 1945

Article 39 of the United Nations Charter, San Francisco 26 June 1945

Article 4 of the Vienna Convention on the Law of Treaties, Vienna 23 May 1969

UN Resolutions/Documents

United Nations General Assembly Resolution A/63/334, 26 August 2008

United Nations General Assembly Resolution A/RES/61/89, 18 December 2006

United Nations General Assembly Resolution A/Res/61/88, 6 December 2006

United Nations General Assembly Resolution A/55/25, 15 November 2000

United Nations General Assembly Resolution A/54/2000, 3 April 2000

United Nations General Assembly Resolution A/54/258, 19 August 1999

United Nations General Assembly Resolution A/52/298, 27 August 1997

United Nations General Assembly Resolution A/51/42, 10 December 1996

United Nations General Assembly Resolution A/50/60, 25 January 1995

United Nations General Assembly Resolution A/Res/377(V), 3 November 1950

United Nations Security Council Resolution S/Res/1540/2004, 28 April 2004

United Nations Security Council Resolution S/1053/2002, 20 September 2002
United Nations Security Council Resolution S/Res/1373/2001, 28 September 2001
United Nations Security Council Resolution S/Res/1308/2000, 17 July 2000
United Nations Security Council Resolution S/Res/340/1999, 26 March 1999
United Nations Security Council Resolution S/Res/1192/1998, 27 August 1998
United Nations Security Council Resolution S/Res/1044/1996, 31 January 1996
United Nations Security Council Resolution S/Res/912/1994, 22 June 1994
United Nations Security Council Resolution S/Res/883/1993, 11 November 1993
United Nations Security Council Resolution S/Res/872/ 1993, 5 October 1993
United Nations Security Council Resolution S/Res/846/1993, 22 June 1993
United Nations Security Council Resolution S/Res/764/1992, 13 July 1992
United Nations Security Council Resolution S/Res/674/1990, 29 October 1990
United Nations Security Council Resolution S/Res/662/1990, 9 August 1990

United Nations General Assembly Document A/C.1/63/L.39, 17 October 2008
United Nations Press Release ORG/1469 of 3 July 2006
United Nations Secretary General, SG/SM/10537, DC/3031, 26 June 2006
United Nations General Assembly Document A/56/757, 26 December 2001
United Nations General Assembly Document A/56/PV.36, 1 November 2001
United Nations Conference in New York, A/CONF.192/15, 20 July 2001
United Nations Press Release GA/9453, 25 September 1997
United Nations Security Council Document S/23500, 31 January 1992